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IN THE

Supreme Court of the United States

October Term, 1978

78-513

RICHARD T. TRACY, SR.

Petitioner,

V.

WILLIAM P. DIXON, ET AL.

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1978

RICHARD T. TRACY, SR.
Judge of the City Court,

Petitioner,

V.

WILLIAM P. DIXON, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioner moves this Court to accept jurisdiction of this, his Petition for Writ of Certiorari under this Court's appellate and supervisory powers. Petitioner, an incumbent City Court Judge of the City of Phoenix, Arizona, was removed from office by a city administrative board, which held secret and public hearings allegedly concerning judicial performance which he was not permitted to attend.

Such Board improperly constituted, under legislation unconstitutional as applied to incumbent judges, acted contrary to the laws imposed upon the states by the

United States Constitution. Appellant raised federal questions at every stage of proceedings, but was denied legal process according to the rules established for the protection of private rights by laws of Arizona and by this Court under the Fifth and Fourteenth Amendment of the United States Constitution.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1978

V.

RICHARD T. TRACY, SR.,
Judge of the City Court,
Phoenix, Arizona,

Petitioner,

V.

WILLIAM P. DIXON, RICHARD A. GARCIA, RALPH G. SMITH, JR., JOHN WENTZ, CITY MANAGER AND MARGARET P. HANCE, MAYOR, WILLIAM DONAHUE, JOY W. CARTER, CALVIN C. GOODE, ROSENDO GUTIERREZ, KENNETH O'DELL, AMY T. WORTHEN, as Members of the City Council of the City of Phoenix, a Municipal Corporation,

Respondents.

ARIZONA SUPREME COURT
Case No. 13195

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that Writ of Certiorari be issued to review procedures and legislation which violate the United States Constitution and deprived Plaintiff of equal protection and due process to law.

The procedures employed are similar to those condemed by this Court since Yeck Wo v. Hopkins, 118 U.S. 356, 6 S Ct. 1064, 30 L. Ed. 220 (1885) in an effort to conceal improper judicial involvement.

Petitioner dismissed from his employment as City Judge and prevented from engaging in his profession by the stigma and proceedings was required to move to another state to escape the vicious, false charges manufactured and published by certain officials of the Respondent, City of Phoenix.

OPINIONS BELOW

The Arizona Supreme Court opinion has been reported at _____ Ariz. _____, 579 P2d 1388, and is reproduced as Appendix "A", the timely Motion for Rehearing was denied on June 27, 1978.

The Ruling in Superior State Court is reproduced as Appendix "B".

FEDERAL QUESTIONS RAISED IN STATE COURTS:

Page 3, Paragraph IV of the Complaint states:

> "Independent court systems by state and national standards call for career appointments on a non-partisan basis with tenure in office, and further the de facto practice, officially promulgated and fostered, and just administration of the Court offered an expectancy of re-employment which would obligate the City Council to grant a hearing where a Judge could be informed of the grounds for his non-retention and challenge their sufficiency. Such right is guaranteed under the 5th and 14th Amendments of the United States Constitution dealing with liberty, property and due process, and also the doctrine of "Judicial Independence" and "Separation of the Powers" inherent in our Federal Constitution and prescribed in Article 3 of the Arizona Constitution:"

Page 4, Paragraph VI of the Complaint states:

> "Following the City of Phoenix adoption in October 1975, of Ordinance S-8742 (Exhibit A), Judge Golston became Chairman of the City of Phoenix Judicial Selection Board. Plaintiff is advised and therefore alleges that Judge Golston was also the chief investigator, witness and selected persons or evidence pertaining to the judges and their judicial performance to be considered by the Board. . . .The plaintiff had on numerous occasions advised the Chairman of the Judicial Selection Board that such procedures were improper, unethical and violative of due process, and plaintiff specifically requested an opportunity to be present when his matter was being discussed. He was assured by the Chairman of the Judicial Selection Board that none of the three judges had reason to be concerned, that he, in particular, performed his duties in a very satisfactory manner, that the Committee did not want any of the judges present when their matters were being discussed, and that any judge who was not being re-appointed would be given an opportunity for a hearing before the Committee and/or the City Council."

Page 10, Paragraph XIV of the Complaint states:

> "Ordinance No. S 8742, creating the Judicial Selection Board, is void, being contrary to Articles 3 and 6 of the Arizona Constitution and against public policy. As to incumbent judges, the language used is not sufficient to have legal significance, it is an over-broad delegation of legislative powers and as applied to incumbent judges constitutes a violation of Article 3 and Article 2, Section 4 of the Arizona Constitution and the 5th and 14th Amendments of the United States Constitution."

The Briefs in the Trial Court and in the Arizona Supreme Court cited and quoted many Federal cases such as:

Pickering v Board of Education, 391 U.S. 563,88 S Ct 1731, 20 L Ed 2d 818.

Schware v Board of Bar Examiners 353 U.S. 232, 77 S Ct 753, 1 L Ed 2d 796.

Wisconsin v Constantineau, 400 U.S. 433, 91 SCt 507, 27 L Ed 2d 515.

Perry v Sinderman, 408 U.S. 593, 92 S Ct.

Regents v Roth. 408 U.S. 564. 92 S Ct 2701. 33 L Ed 2d 548.

Monroe v Pope. 365 U.S. 167. 81 S Ct 473. 5 L Ed 2d 492.

Madison v Marberry. 1 Cranch 137. 2 L Ed 60.

Greene v McElroy. 360 U.S. 474.

Wong Yong Suing v McGrath. 339 U.S. 33. 70 S Ct 445. 94 L Ed 616.

Thruax v Corrigan. 257 U.S. 313. 42 S Ct 124. 66 L Ed 254.

Thruax v Raich. 239 U.S. 33.

The Due Process clause of the Arizona and United States Constitution, cases on independence of the judicial, equal protection and separation of powers were all advanced in the Courts below.

JURISDICTION

This Court's jurisdiction is found in 28 U.S.C. 1257 (3) and Rule 19.1 (a) and (b) Rules of the Supreme Court of the United States.

This Petition for certiorari is filled within 90 days after denial of a timely motion for rehearing.

STATEMENT AS TO JURISDICTION

All proceedings to date, conflict with well established decisions of this Court and depart from the accepted and usual course of judicial proceedings. The independence and integrity of the judiciary and oppressive acts perpetuated to date on Petitioner call for the exercise of this Court's power of supevision over the courts of this nation.

The State Action brought to void administrative proceedings on several grounds was improperly dismissed without trial or hearing. The final judgment was worded in such a manner as to bar Petitioner from proceeding against officials for civil rights violations under 42 U.S.C. 1983-1988.

The presence of the Chief Justice of the Arizona Supreme Court as ranking member of the City of Phoenix Judicial Selection Board was intended to and did deprive Petitioner of a fair hearing, trial and appellate review.

This court, is vested with powers to check such abuses by State officials.

QUESTIONS PRESENTED

1. Is a member of the judiciary, who follows the mandate of the Judicial Code and oath of office and discreetly offers constructive criticism of an unfair and inefficient justice system, entitled to the protection of the First, Fifth and Fourteenth Amendments of the United State Constitution?

2. Is an Attorney-Judge deprived of liberty and property when a board, composed of the highest ranking state judicial officer, other judges and lawyers of an integrated bar association, improperly intervene and prevent his reappointment to office?

3. Does the doctrine of immunity for judicial acts limit an investigative body to consider only acts of misconduct of an incumbent; can the incumbent judge be denied the right of notice and hearing?

4. Whether an Attorney-Judge incumbent of an office until removed for "cause" by law can be removed without notice or hearing by a reviewing board merely waiting until his fixed term expired and then holding public and secret hearings which alledgely reviews his performance. The alleged investigative findings then used as the basis of nonretention, with no right of appeal.

5. Whether legislation which provides that an Administrative Board is to "advise the Council concerning reappointment of incumbents" which is interrupted to authorize secret hearings at which the person reviewed is not permitted to be present or at any time

meet with Board members is unconstitutional in its application?

6. Whether an incumbent judge required to hold over in office until the appointing authority regularly acts is denied equal protection of the law under the Fifth and Fourteenth Amendments of the United States Constitution when an official board constituted in a manner which violates the State Constitution prevents the appointing body from reviewing their proceedings and evidence.

7. Whether Petitioner was denied Equal Protection and Due Process under the Fifth and Fourteenth Amendments of the United States Constitution when the trial Court without evidence granted Summary Judgment to the Respondant City of Phoenix, based upon the State Judicial Merit Selection Amendment, Article 6 36 E Arizona Constitution when such Amendment does not apply to City Court Judges.

8. Whether Petitioner was denied Equal Protection and Due Process when the state's highest Court disregards current law and holds he has no standing to request review of or object to irregularities effecting his private rights and denies him specific remedies embodied in the law and overlooks specific provisions of law which provide that certain official acts are "null and void."

THE FACTS AND CASES

1. Plaintiff-Appellant, admitted to the Bar in 1954 after private law practice in Ohio and New York, relocated in Arizona for family health reasons. As a law clerk, he served the Arizona Supreme Court for one year, after private law practice, he was appointed a Phoenix City Court Judge. The court was in a state of chaos, unable to function, by example and persuasion, distribution of legal summaries, facts and figures, he assited in reducing the backlog of pending cases, which reduced new cases and helped implement rules and policies that eliminated waste and unequal treatment.

REACTION TO IMPROVEMENT IN THE COURT

2. The City administration dominated by a bipartisan conservative group in control of Phoenix City affairs preferred the previous system of confusion which enabled them to manipulate cases and dismiss charges without fear of detection or criticsm. Petitioner had as mandated by Canon One, Judicial Code of Conduct attempted to provide an efficient civil and criminal lower Court system which would relieve the congestion in the Courts. With twice the national average per capita of judges, most contested criminal cases were not being processed and civil matters subject to long delays. Petitioner's efforts to improve the court, increase communications as a check and balance, assist in providing certainty in results of litigation and eliminate corruption, brought about a coalition dedicated to blocking his reappointment.

THE SEPARATION OF POWERS OF PHOENIX CITY GOVERNMENT

3. The City Court, a "separate and independent branch of city government" by City Charter, provided that judges would be appointed by City Council for four year terms and removed only for cause by affirmative vote of two thirds of City Council. No provision was made for removal by appointment of a successor or expiration

of fixed term. City Charter. Chapter 8. section 3B (N1). Following the mandate of this Court the intent clear. to be politically independent. incumbents. prior to expiration of term. would be offered reappointment or a hearing before the City Council. Ninety days before expiration of Petitioner's fixed terms. the Judicial Selection Board was established to "advise the Council regarding reappointment." City Ordinance § 8742. The Board waited until Petitioner's fixed term expired. then. on February 25. 1976. held an advertised public meeting and secret meetings. at which the Chairman. the City Prosecutor and Chief Public Defender were witnesses. The purpose was to review the judiciary performance of three incumbents. two of whom had requested but were not permitted to attend any meetings. Having waited until fixed terms had expired. the Board acted as though they dealt with vacancies in office. removed two of the incumbents. interviewed applicants and when Petitioner protested and requested a Council hearing. which had been offered. coerced the City Council into denying a hearing or de novo appeal. The prestigious Board "threatened to resign en masse

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N1

Chapter 8. Section 1

"There shall be a city Court system as a *separate* and *independent* branch of the government of the City of Phoenix . . ."

Chapter 8. Section 3 (a) (b)

"(a) The judges of the City Court shall be appointed by the Council of the City of Phoenix . . . *All subsequent appointments shall be for four year terms. a vacancy occurring* before the expiration of a term shall be filled by appointment for the remainder of the term."

"(b) Judges of the City Court *may be removed* by the City Council *for cause* on motion adopted by the affirmative vote of two thirds of the members of the Council." Emphasis supplied.

if its recommendations weren't upheld." Further. the Board. through its Chairman. issued vicious false charges to the press on March 2. 1976 after reappointing one incumbent and taking successors under consideration.

Chapter 8. Section 3 (b) was not limited to removal during term. a phrase found in (c). the proceedings of February 25 and March 2. 1976 dealt with disciplining and appointment. Petitioner's successor was appointed to the balance of his second term. The practice had been to appoint only incumbents to the balance of their additional term. except in the event of a vacancy. Under the law there was no vacancy. Sweeney v State. 23 Ariz. 435. 204 P2d 1025.

NO VACANCY DUE TO EXPIRATION OF FIXED TERM

4. Sections 38-291 and 395 (b) A.R.S. and a long line of cases prevented a vacancy from occurring until the appointing body had "regularly acted," *McCall v. Cull*. 51 Ariz. 237. 75 P.2d 696. While Administrative Law Rules and the Open Meeting Law granted a right to a de novo hearing and A.R.S. 38-431.03.1. provided that upon "demand" by an "appointee or employee." "the discussion and consideration" of "employment or appointment" "occur at a public meeting." (N2) A.R.S. 38-431.05

N2

Section 39-431.03.1 A.R.S.

"A. This article shall not be construed to prevent governing bodies. upon majority vote of the members constituting a quorum. from holding executive session for only the following purposes:

1. Discussion or consideration of employment. assignment. *appointment*. promotion. demotion. salaries. disciplining or resignation of a public officer. appointee or employee of any governing body. except that with the exception of salary discussions. an *officer. appointee or employee may demand that such discussion or consideration occur at a public meeting.*"

provided all business transacted in violation of the provisions were null and void. That would apply not only to the removal of Peitioner, but also the appointment of his successor.

After demand upon both Board and Council, such bodies did meet secretly, and voted to remove and replace Petitioner. It was then that extensive press and T.V. coverage with charges against Petitioner commenced, intended to lose him Council and public support. Plaintiff appeared at City Council's weekly meeting on March 9, 1976 and requested a due process hearing, at which time his successor was appointed to the remainder of the term and he, effective April 5, 1976, was to vacate his office.

PROCEEDING IN SUPERIOR COURT

5. After demand and refusal to prosecute by the Attorney General and County Attorney, Petitioner, unable to obtain legal counsel due to the composition of the Board, on May 25, 1976 filed in Maricopa County Superior Court Case No. C-333371, a Petition under the following provisions of the laws of Arizona.

(1) Quo Warranto, A.R.S. 12-2043

(2) Equity Action under Open Meeting Laws, A.R.S. 38-431.07

(3) Certiorari Rule 4 and 6, A.R.S. 17 and 12-2001

As directed by the United States Supreme Court in Paul v. Davis 424U.S.693, and Bishop v. Woods 426U.S.341 and Monroe v. Pape, supra, in an effort to void the aforesaid proceedings, mitigate damages, restore the status quo.

The Superior Court Judge, after finding the Petition stated a claim, issued an Order to Show Cause. On June

22, 1976, at the time of hearing the court instead limited the hearing to a sham Motion to Dismiss and shifted the burden of proof contrary to Campbell v. Superior Court, 106 Ariz. 542, 479 P2d 685 and disregarded limitations imposed on officials of Respondent by the City Charter contrary to the law stated in Scottsdale v. Superior Court, 103 Ariz. 204, 290 P2d 439 and Kendall v. Malcom, 98 Ariz. 329, 404 P2d 414.

In granting Summary Judgment for Respondent, City of Phoenix and the new judges on basis of "absolute power" of City Council, the court held the Phoenix Judicial Selection Board "conformed to State Constitution's provision for Merit Selection". The Formal Judgment and Findings of Fact and Law, however, encompassed claims and persons not before the Superior Court and made no reference to the Merit Selection Amendment because it did not apply to City Court. The Court refused to allow witnesses to be called so petitioner could show that he was entitled to the office, respondents abuses of power as well as lack of jurisdiction. Respondents presented no verified pleadings, only Petitioner's evidence was offered as exhibits in defense of a motion for Summary Judgment, Rule 56 (c) A.R.S. 16, Rules of Civil Practice. There is no recent legal authority to grant such relief to the Respondent under the state of the pleadings.

THE NEED TO CONTINUE AT THE STATE LEVEL

6. On July 6, 1976, a Writ of Certiorari was taken in Case No. 12760 to the Arizona Supreme Court. The Chief Justice disqualified himself and the Associate Justices, to whom Petitioner was well known, allowed ten minutes of argument and refused jurisdiction.

The right to appeal granted by statute, Notice of Appeal was then filed in the Arizona Court of Appeals in Case No. 1 CA-CIV 3595 on August 3, 1976. Attempts to

acclerate the appeal were frustrated by delay and dismissal efforts of Respondents. The above conduct under color of law not resolved on a local level as suggested in Paul v. Davis, and Bishop v. Woods by Justice Renquist. Petitioner proceeded against the officials in their individual capacity. The state action was filed under the holding in Monroe v. Pape, supra, prior to this Court ruling that a local governing Body may be a person under 42 USC 1983, Monell v. Dept. of Social Service. And the holding that "the federal remedy is supplementary to the state remedy."

On February 16, 1977, Petitioner duly commenced in the Federal District Court for Arizona three civil rights actions in one complaint seeking damages and injunctive relief against fifteen individuals. Citing 28 USC 1331 and 1343, 42 USU 1981 to 1988 inclusive and injunctive relief.

The case, No. CIV 77-121 Arizona District Court for practical purposes was terminated by Summary Judgment being awarded Defendants on all damage claims and as to most parties without a verified pleading having been filed by Defendants. The District Court Judge holding that the matter can best be handled by the State Court. That judgment is pending on appeal to the 9th Circuit, Court of Appeals.

The following day, on April 8, 1977, the state appeal, was transferred on order of Chief Juctice Cameron, a Respondent in his individual capacity in the Federal case, to the Arizona Supreme Court.

On May 23, 1978, The Arizona Supreme Court affirmed the trail Court's dismissal on the basis that only the Attorney General or County Attorney could contest the irregularities in the removal or appointment proceedings citing pre Monroe v. Pape, supra, cases, thereby denying Petitioner the modern concept of justice referred to in Gena v. Superior Court, 103 Ariz. 240, 439 P2d 811 and State v. Downey, 102 Ariz. 360, 430 P2d 122. Where the Court pointed out that "It is fundamental that no court of law, board or administrative agency can act without jurisdiction." That Quo Warranto is a method of testing jurisdiction. The opinion did not address the other issues raised on appeal.

REASON FOR GRANTING THE WRIT

1. The opinion of the Arizona Supreme Court (Appendix "A") was authored by the Vice Chief Justice who in 1968 wrote the opinion in Bennett v. Arizona Board of Public Welfare, 95 Ariz. 170, 388 P2d 166 and later cited Willner v. Committee, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed. 2d 224 and, pointed out that one may not be excluded by state action from a business, profession or occupation in a manner or for reasons which contravene the due process clause. . . .Stating: "We believe that there is inherent in our democratic system the right to compete freely on an equal basis for the material goods of existence and that the right is protected by the due process and equal protection clauses of the Fourteenth Amendment. . . ." Application of Levine, 97 Ariz. 88, 397 P2d 205.

The Arizona Supreme Court refused Petitioner's claim to question the Boards actions and the remedy granted by the Open Meeting Law, 38-431.07 A.R.S. to prosecute in his own name. This was the basis of Petitioner's Second Cause of Action. The right of confortation stated in Foreman v. Creighton School District 87 Ariz. 329, 351, P2d 165 (1960) is a doctrine set out by this Court in Greene v. McElroy, supra. Star Chamber or Secret proceedings as were held in preventing Petitioner from competing layed to rest by Justice Frankfurter writing in In Re Gault 387 U.S. at page 21.

The use of confidential information which the board revealed only to City Council and press and failure to allow Petitioner to respond was condemned by this Court

in Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 753, 1 Ed. 2d 796 when this court held:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . Regardless of how the States grant of permission to engage in the occupation is characterized."

DOCTRINE OF BOTH REGENTS v. ROTH AND PERRY v. SINDERMAN APPLY

2. The fact that hearings were held supports Petitioner's claim that he had tenure, or defacto tenure within the meaning of Perry v. Sniderman, supra.

The stigma caused by the non-retention and publication of false charges given wide spread public attention. Placed in evidence were articles and editorials quoting the Chairman of the Phoenix Judicial Selection Advisory Board concerning testimony allegedly received in secret meetings clearly entitling Petitioner to the relief available under Regents v. Roth, supra. Such doctrine was recognized by the Arizona Supreme Court within thirty days after Petitioner's removal from the bench when Chief Justice James Duke Cameron authored the opinion in Smith v. Pima County Law Enforcement Council, 548 P2d 1151 113 Ariz. 154, holding that Smith, a non-tenured police officer was entitled to a due process hearing because of stigma created by non-retention. The principle charge, non-payment of debts by Smith, clearly was not the serious damaging charges and inferences applied to Petitioner.

DENIAL OF RIGHTS OF CITIZENSHIP LOSS OF "LIBERTY" AND "PROPERTY"

3. On June 20, 1976, while this nation prepared to celebrate its bicentennial, Petitioner, ostracized and

abandoned by the legal community for defying an autocratic City Judicial Selection Board by requesting a fair hearing, filed a brief in the Superior Court, which in part read as follows:

> "On July 4, 1776, the Declaration of Independence was signed which provided in part."
>
> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their powers from the consent of the governed. . .
> It was not until 1868, with the adoption of the 14th Amendment, commonly known as the due process clause, that the promise of Life, Liberty and the Pursuit of Happiness held meaning for the common man or woman.
>
> AMENDMENT XIV (Rights of Citizenship) United States Constitution:
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "The Due Process Clause brought down from the Magna Charta is also found in Article 2, Section 4 of the Arizona Constitution; as the United States Supreme Court said in Truax v. Corrigan, 42 SCT 124, 257 U.S. 312-66 LEd 254:
>
> The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judg-

> ment only after trial, so that evey citizen shall hold his life, liberty, property,and immunities under the protection of the general rules which govern society. Hurtado v. California, 110 U.U. 516, 536. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law' 'this is a government of laws and not of men' 'no man is above the law' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws."

The message of the Declaration of Independence is not moot, when constitutional safeguards are, as in this case, set aside, those charged with the responsibility of enforcing its provisions, must not find excuses to step aside and allow the abuse to stand.

The Arizona Supreme Court affirmed the Superior Court who summarily dismissed with prejudice the Petition, although the proceedings before the Board and City Council were for numerous reasons void, not only under recent decisions cited in this application, but under cases as Wong Yen Suing v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 95 L Ed. 616, and Yeck Wo v. Hopkins, 188 U.S. 356, 6 S.Ct. 1064, 30 L. Ed. 200 (1885) where this Court said:

> "For the very idea that one may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any county where freedom prevails, as being the essence of slavery itself."

INDEPENDENCE AND INTEGRITY OF THE JUDICIARY

4. Under our Constitutional form of government the judiciary had carefully avoided non judicial assign-

ments for reasons stated in Hayburns Case 2 D C 11, 409 1 L. Ed. 436 (U.S. 1792) and Davies v. Osborne 14 Ariz. 185, 125 P. 884 (1912) In City of Phoenix v. Pensinger 73 Ariz. 420, 242 P. 2d 546 (1952), the Arizona Supreme Court found unconstitutional a City Charter Amendment which called for a judge of a Court of Record to select candidates for the office of City Magistrate, later to be called City Judge. Phoenix City Ordinance § 8742 provides both Appellate and Superior Court Judge are to serve on the Board. The Chief Justice assigned himself to serve in such position and then withdrew after Petitioner was removed from office.

SOVEREIGN POWER WAS PRESENT, THE ACCUSED WAS NOT

5. Vast power over the destiny of a member of the bar and judiciary rested with Chief Justice Cameron, as he sat as a member of the City of Phoenic Judicial Selection Board. The right of dissent by the four other lawyer member of the Board was inhibited, also the right to refuse to appear or testify in the case of the City Prosecutor and Chief Public Defender, both of whom were summoned to testify for twenty minutes at the "private meeting" concerning the "confidential views of the members of your (their) office as to the quality and qualifications of the incumbent judges." The expected impact upon the three lay members of the board was summed up by Mr. Whitecraft, a School Superintendent, who testified that the lay people based their decision on "proper judicial procedures" as recommended by the "judges on our (the Board) committee."

THE EVIDENCE AND STANDARD OF PROOF AS IMPROPER AS THE BODY AND PROCEDURES

6. Courts have universally adopted the pronouncement in In re McGarry, 380, R.I. 359, 44 N.E. 2d 7:

"We hold that public policy which renders a judge acting in a judicial capacity in a court proceeding immune from liability, applies with equal force to a disciplinary proceeding."

In In re McLaughlin, 153, Tex. 183, 165 S.W. 2d 805, appeal dismissed, 343 U.S. 859, 75 S.Ct. 83, 99 L. Ed. 677, the Court held:

"in so grave a matter as depriving a judge of his office, the appropriate standard of proof is clear and convincing evidence."

The Judicial Selection Board denied Petitioner his right to succeed in office based on hearsay testimony of employees of the Respondent with no cross examination. The Chairman, Roger Golston, at a proceeding concerning impartiality of the City Judges due to the unorthodox removal procedure, State v. A.M. Segedy, 20329069-OC, City of Phoenix Court, March 15, 1976, Testified in part:

When asked:

"Q: and don't you think a person who appears before that kind of a Board situation can say many things since he knows they're not being taken and therefore, it would never be divulged to anybody. Maybe they could misinterpret or exaggerate or maybe give untruths, isn't that right?"

Judge Golston, the then Chief City Court Judge's response was:

"A: It's possible, sure."

The above recited evidence was before the Arizona Courts when they dismissed Petitioner's claims. In Chambers v. Central Committee, 224 P. 2d 583, the California Court held:

"a judge is not answerable to the Bar Association, only the law and that to safeguard the independence of the judiciary, it is necessary to show misconduct on the part of the judge before subjecting him to any form of discipline."

Is the same test not applicable when the judicial hierarchy conducts the inquiry. Canon One of the Judicial Code of Conduct. Rule 45 Arizona Supreme Court provides:

"CANON ONE

"A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this code should be construed and applied to further that objective."

Webster's New World Dictionary defines:

Independence. A being independent; freedom from control of another.

Integrity. 1. A being complete; wholeness. 2. Unimpaired condition; soundness. 3. Uprightness, honesty and sincerity.

As a member of a separate and independent branch of government and the judiciary, Petitioner attempted to comply with the mandate of Canon One as amplified by Canons of Judicial Ethics, 2d Edition by Raymond L. Wise, Mathew Bender 1970. Samples of that effort can be found in Appendice "C" and "D" and demonstrates efforts to be in a position to fulfill his oath of office. He devoted to that task as much time as required, tormented by some, appreciated by others, even Chief Justice Cameron wrote expressing the Supreme Court's appreciation of Petitioner's efforts. Petitioner as mandated by the Code and City Charter, avoided politics. His goal was to establish a fair court system with checks and balances to enable the judiciary to perform its function.

For his efforts he was so stigmatized as to be unemployed for two years, required to lose his home, and leave two grown children in Arizona as he moved back to his home town to re-establish his practice and start over again at 53 years of age.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

By: Richard T. Tracy, Sr.
Petitioner Pro Se

APPENDIX "A"

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In Division

RICHARD T. TRACY, SR.,
Judge of the City Court,
Phoenix, Arizona,
Appellant,

v.

WILLIAM P. DIXON,
et al.,
Appellees.

No. 13195

FILED

MAY 23, 1978

Appeal from the Superior Court of Maricopa County
Cause No. 333371
Honorable Lawrence H. Doyle, Jr., Judge

AFFIRMED

STRUCKMEYER, Vice Chief Justice

This is an appeal from the judgment dismissing a specail action in the Superior Court of Maricopa County, Arizona. We accepted jurisdiction pursuant to Rule 47 (e), Rules of the Supreme Court. Affirmed.

On February 14, 1972, the appellant, Richard T. Tracy, Sr., was appointed to a four-year term as a Judge of the City Court of the City of Phoenix. On February 14, 1976, his term of office expired by the passage of time. Appellant brought suit in the Superior Court of Maricopa

County, alleging appellees William P. Dixon and Richard A. Garcia on April 6, 1976, under color of void and illegal appointments, unlawfully usurped his office. Appellant assigns numerous reasons why Dixon and Garcia are usurping his office of City Court Judge, but we think the Superior Court did not err, because quo warranto can only be maintained by a private person when he can show that he is entitled to the office. This, appellant cannot do.

By A.R.S. § 12-2042, an action may be brought in the Superior Court by the county attorney against any person who usurps, intrudes into or unlawfully holds any public office within his county. By § 12-2043, if the county attorney refuses to bring such an action at the request of any person claiming such office, the person may apply to the Superior Court for leave to bring the action in his own name. The county attorney refused to bring an action to test appellant's right to the office and the Superior Court granted appellant leave to bring the action in his own name. After a hearing, the court ordered the action dismissed.

In State of Arizona ex rel. Sullivan v. Moore, 49 Ariz. 51, 64 P.2d 809 (1937), under a companion statute to § 12-2042 by which the Attorney General may bring an action in the Supreme Court, we said that the purpose of the action by the Attorney General is to protect the public interest by preventing one who is not entitled to an office from exercising it, and not to establish the private right of some citizen who is legally entitled to the office. We also said:

> "It may be commenced by the Attorney General on his own information or upon the verified complaint of any person. And in such an action the judgment to be rendered is that the defendant be excluded from the office, nothing being said about the rights of any claimant thereto. Section 4407 (now A.R.S. § 12-2043), however, contemplates a very different proceeding. It is not based on the protection of a public interest primarily, but on private rights, and in such an action there must be some person claiming the office or franchise which is being unlawfully held.' * * * The complaint must show the one who is entitled to the office, and the judgment, instead of being one merely excluding the unlawful holder, in addition adjudges who is entitled to the office * * *." Id. at 57, 64 P.2d at 812.

Since appellant's term of four years expired on February 14, 1976, he cannot show that he is entitled to the office.

Appellant incorporated in his complaint in the court below a second and third claim for relief. In these claims, he attacked various aspects of appellees' appointments to the City Court. The rule of law is well established, however, that a claimant to an office may have judgment only on the strength of his own title and not upon any infirmity or weakness in the defendant's title. La Polla v. Board of Chosen Freeholders, 71 N.J. Super. 264, 176 A.2d 821 (1961); Ebright v. Buck, 326 Mich. 208, 40 N.W. 2d 122 (1949); State ex rel. Maffett v. Turnbull, 212 Minn. 382, 3 N.W. 2d 674 (1942); Black v. Cummings, 62 R.I. 361, 5 A.2d 858 (1939); State ex rel. Davis v. Plapp, 61 Ohio App. 76, 22 N.E. 2d 456 (1938); State ex rel. Stain v. Christensen, 84 Utah 185, 35 P.2d 775 (1934).

As an example of the various holdings supporting the foregoing principle, in State ex rel. Maffett v. Turnbull, supra, the court held:

> "Relator cannot help his case by an attack on respondent's title to the office. Relator can maintain the present proceeding only if he is entitled to the office; otherwise the matter is no concern of his, but of the Attorney General as the official to whom the right of instituting quo warranto is confided as the representative of the public.' 3 N.W. 2d at 677.

And in State ex rel. Stain v. Christensen, supra, the court said:

> "One who seeks the aid of a court to be inducted into an office must show a present right. If the showing be that one has been entitled to the possession of an office but that such right has ceased to

exist, a court may not properly lend its aid to place such a person in office." 35 P.2d at 782.

The judgment of the Superior Court is affirmed.

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN , Justice

FRANK X. GORDON, JR., Justice

APPENDIX "B"

IN THE SUPERIOR COURT
OF MARICOPA COUNTY, STATE OF ARIZONA

Later . . .

This matter having been under advisement,

The Court determines that the City of Phoenix under its City Charter has a right of home rule.

The Court further determines City of Phoenix in preparation of the Judicial Selection Committee conforms to the State Law and Article 6, paragraph 36 of the Arizona constitution and particularly Section 36E.

The Court futher determines that constitutional by authority, public or executive hearings, has to be determined by the Selection Committee.

The Court further determines that the Selection Committee has perogative of calling what candidates they wish to interview.

The Court further determines that the Selection Committee did hold open meetings to determine proper officers or employees to be hired for a definite period of time.

Court further determines that the City of Phoenix has the absolute power and authority under its charter to hire personnel for a specified period of time and for a specified salary.

Court further determines that at the end term of employment. the City may seek other qualified persons or rehire the person for an additional period as designated by the City of Phoenix and its charter and amendment thereto.

Court further determines that its in the best interest of the City of Phoenix and citizens of the City of Phoenix to set the judicial standards and standards of anyone employed in executive or judicial office.

Court further determines that the Judicial Selection Committee and the City of Phoenix did not commit any capricious. arbitrary or detrimental acts as to the Petitioner.

Court further determines the contract of employment is for a term as specified. that at the end of the term. City of Phoenix or any employee can specify any additional terms of employment and qualifications thereof.

The Court further determines that the removal from office of any judicial officer during his term is based on misfeasance nonfeasance or malfeasance while said individual is in office and does not apply to a re-employment or a new contract.

The Court further determines that if judicial appointments are subject to the will and control of the people of the State of Arizona and they approved the matter of selection; therefore,

The Court concludes that all actions of the City of Phoenix and the Judicial Review Committee were proper and in conformance with all the standards of procedures as required by the statutes of the State of Arizona and the constitution of the State of Arizona.

The Court further concludes that the composition of the Judicial Commission are proper and in conformance with the opinion of Bridegroom v. State Bar filed June 9, 1976 as #2 CA-Civ 2083.

The Court further concludes that the City of Phoenix under the period of the last seven years has sought a method to set up a procedure for appointment of Judges which would not be subject to the criticism as to seperation of powers of the executive. legislature and judicial branch.

IT IS ORDERED dismissing the complaint with costs to the Defendants. The Court further concludes that Ralph Smith is not a proper party having been appointed to another Judges position who had resigned.

IT IS FURTHER ORDERED that counsel for the Defendants shall prepare Findings of Fact and Conclusions of Law in accordance and pursuant with Rule 52 LRCP and Rule 8(c) LRP. and a formal Judgment pursuant to Rule 58 ARCP for presentation to the Court.

IT IS FURTHER ORDERED admitting Exhibits #1 through Exhibit #14 in evidence for the purpose of determining the issue on the Motion to Dismiss.

APPENDIX "C"

Arizona Republic
1974

Progress made in lower court revision drive

The Republic's report on the open meeting of the Advisory Committee on Lower Court Reorganization was somewhat disappointing to this reader. The negative reasons for reorganization were stressed, the positive aspects underplayed. I believe it was a healthy and productive discussion on a subject which has been under consideration since 1960 when the voters approved the Modern Courts Amendment to the State Constitution.

Nationally the court systems are being re-examined. The crime rate has steadily increased in spite of tripling law enforcement budgets over the past 10 years. This year over $10 billion will be spent on state and local law enforcement. The direct and indirect loss to the public from crime is impossible to ascertain. It serves no purpose to increase the size of the funnel (law enforcement) or the container (correction and reform) without at least examining the filter and opening of the container to look for obstructions.

The court budget for the entire state is about half that of the City of Phoenix for law enforcement. It is false economy to deprive the courts of the tools necessary to effectively perform their function.

At the meeting several obstructions were called to the committee's attention from both rural and urban areas: Plea-bargaining on a de novo appeal; the city being required to prosecute while the county retains the revenue; lack of communication between the various courts on issues seldom. . . . . .

APPENDIX "D"

(Letterhead of Judge Richard T. Tracy)

September 27, 1973

Honorable R. C. Coulter, Jr.
Superior Court Division 24
125 West Washington Street
Phoenix, Arizona 85003

Re: Kilstrom v. Tracy
C 282326

Dear Judge Coulter:

Allow me to thank you for your patience at the hearing on the above caption matter on September 25th. You are correct, I cannot adjust to the system that currently exists and therefore, work hard to try and change the system. I deplore the fact that thousands of cases are plea bargained or dismissed without regard to the merits. That several lawyers have a ninety percent dismissal rate and never try a case. Such practice (sic) is not fair to other defendants or lawyers who do not manipulate the system. Over thirty-five percent of D.W.I. cases are reduced or acquited in the Phoenix City Court, of those appealed, an additional fifty-five percent are dismissed.

I have proposed legislation that would eliminate a de novo trial when a trial in the lower court was waived and permit an appeal on questions of law to the Superior Court or Court of Appeals by both the defense and the State. Remands for trial and motions for a new trial are unheard of in Maricopa County, dismissal and plea bargains on appeal are common. Once defense attorneys find that cases will be disposed of on the merits, the number of trial setting in our Court will decrease, the appeal will become rare. In other Jurisdictions, appeals on questions of law far out number trial de novo.

In recent months, we have made great strides in bringing our case load current, affording all a fair trial and the Guilty an opportunity for rehabilitation. I am proud of my role and that is why I was so disturbed by the untrue allegations of the petition. Had the objection been made at the time of trial, rest assured that I would have considered another course of action.

I appreciate the fact that an ex parte restraining order was not granted by you in this case. It is the first time, to my knowledge, that a hearing was required. Such action, I am certain, would reduce the special actions filed, as well as increase the time before trial that an attorney would review his defense in a given case.

Sincerely yours,
/s/ Richard T. Tracy
Richard T. Tracy

RTT/hc

Supreme Court, U. S.
FILED
OCT 25 197(
MICHAEL RODAK, JR., CLE

NO. 78-513

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1978

RICHARD T. TRACY, SR., PETITIONER

v.

WILLIAM P. DIXON, ET AL., RESPONDENTS

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF FOR RESPONDENTS IN OPPOSITION

ANDY BAUMERT
City Attorney

BEN P. MARSHALL
Assistant City Attorney
800 Municipal Building
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Phoenix, Arizona 85003
Attorneys for Respondents

IN THE SUPREME COURT OF THE
UNITED STATES
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RICHARD T. TRACY, SR., PETITIONER
v.
WILLIAM P. DIXON, ET AL., RESPONDENTS

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF FOR RESPONDENTS IN OPPOSITION

ARGUMENT

The Petition for Writ of Certiorari was not filed within ninety days after denial of Motion for Rehearing. There was no extension of time granted by a Justice of the Supreme Court. The command of 28 U.S.C. 2101(C) is that a writ of certiorari must be sought "within ninety days after entry of such judgment or decree."

Where, as in this case, the time for filing a petition is established by an Act of Congress rather than a rule of this Court, an untimely filing has consistently

been held to be jurisdictional defect, making it impossible for the Court to waive the untimeliness or to entertain the petition. Such a Petition "must be denied for want of jurisdiction." Department of Banking v. Pink, 317 U.S. 364, 268 (1942). A waiver of untimeliness can be made only where a rule of this Court, rather than a statute, establishes the time requirement. Sclacht v. United States, 398 U.S. 58, 63-65 (1970).

The Petitioner has raised the same issues presented here in an action filed in the United States District Court for the District of Arizona, CIV 77-121, which is presently on appeal to the United States Court of Appeals for the Ninth Circuit, No. 77-2034.

CONCLUSION

The Petition for Writ of Certiorari to Arizona Supreme Court should be denied.

Respectfully submitted,

ANDY BAUMERT
City Attorney

By Ben P. Marshall
BEN P. MARSHALL
Assistant City Attorney
Attorneys for Respondents

Supreme Court, U. S.
FILED
NOV 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-513

RICHARD T. TRACY, SR.

Petitioner,

V.

WILLIAM P. DIXON, ET AL.

Respondents.

PETITIONER'S REPLY BRIEF

RICHARD T. TRACY, SR.
4272 Wedgewood Drive
Youngstown, Ohio 44511
Attorney and Petitioner Pro Se

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

78-513

RICHARD T. TRACY, SR.
Judge of the City Court,

Petitioner

V.

WILLIAM P. DIXON, ET AL,

Respondents

PETITIONER'S REPLY BRIEF

ARGUMENT

Through circumstances beyond Petitioner's control, the Petition for Writ of Certiorari apparently was not docketed until the morning after the ninetieth day following the denial of Motion for Rehearing. Such Petition was printed and mailed air-express mail prior to the expiration date. The delay was not foreseeable; therefore, an application for extension as authorized by 28USC 2101(C) was not believed necessary.

Petitioner had notified Respondents of

his intention to seek Certiorari on July 11, 1978, by serving them with a copy of the request for record as provided by Rule 21, Rules of the Supreme Court which serves a function similar to a Notice of Appeal. Respondents were advised that they were not free of Petitioner's demands. Further, there is pending in the 9th Circuit Court of Appeal and the Federal District Court of Arizona being Case No. 77-2034 and Case CIV 77-121PX respectively dealing with the same subject matter and somewhat the same parties in their individual capacity; therefore, finality is absent in this case. Denial of jurisdiction will only continue a multiplicity of suits, and provide incomplete relief to Petitioner as well as subject some Respondents to damage claims properly the responsibility of the Respondent herein the City of Phoenix.

In October, 1977, Petitioner had applied to this Court for a Writ to consolidate both State and Federal cases prior to Judgment. Such Petition in Case No. 77-348 was dismissed on October 17, 1977. In both cases, Petitioner requested this Court exercise its supervisionary powers under Rule 19, Rules of the Supreme Court since the improper acts complained of resulted from overt acts of these who also occupy judicial positions.

The language of 28 U.S.C. 2101(C) lacks the peremptory phrase that "no appeal shall be allowed," Matton & B Co. vs. Murphy (1943) 319 US 412, 87 L Ed2d 1483, 63 S Ct 1126. Instead power is granted this Court to act to avoid unfairness in extraordinary cases and this Court did in fact adopt in its rules provisions which recognize a postmark date prior to the expiration of the period provided by law. The peremptory legislative restriction is found in limiting the extension beyond sixty days of the prescribed period.

The delay was caused by the printer's failure to meet its commitment to provide the Brief by September 22nd for mailing thus requiring Petitioner to pay for overtime printing over the weekend and being unable to deliver it to the Clerk by the close of business on the 25th day of September, 1978.

CONCLUSION

This Court has jurisdiction and the Petition for Writ of Certiorari should be allowed.

Respectively submitted,

RICHARD T. TRACY, SR.
Petitioner Pro Se